

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

74-1239

MAR 22 1974

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NEW YORK, NEW YORK

-----x

GINO FANTUZZI & SERGIO JARAMILLO,

Appellant

vs.

APPEAL NO: 74-1239.

UNITED STATES OF AMERICA,

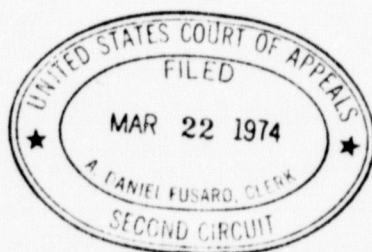
Appellee

-----x

BRIEF OF APPELLANT

AND APPENDIX

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
NEW YORK, BROOKLYN, NEW YORK
(U.S.D.C. CIVIL NUMBER 73-C-882)



Gino Fantuzzi & Sergio Jaramillo
Appellants Pro Se
United States Penitentiary
Atlanta, Georgia 30315

PAGINATION AS IN ORIGINAL COPY

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STATEMENT PURSUANT TO RULE 28 (3)

(a) PRELIMINARY STATEMENT:

This is an appeal from a MEMORANDUM AND ORDER on Appellants' Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255. A hearing on the Motion to Vacate Sentence was set for 10:00 A.M., on October 12, 1973, before Judge ORRIN G. JUDD, U.S.D.J., and notification of this hearing was served on THOMAS PUCCIO, Assistant United States Attorney, (See Exhibit I. attached). The hearing was conducted, apparently, on January 8, 1974, with no appearance made in behalf of the Respondent, by the Office of the United States Attorney (See Exhibit II attached hereto).

(b) STATEMENT OF FACTS:

Appellants were tried and convicted at a joint trial in the United States District Court for the Eastern District of New York, JUDGE ORRIN G. JUDD, sitting without a jury. Appellants were convicted of violations of 21 U.S.C. §§ 173 and 174, with the knowing conspiracy to import cocaine. The appellants were sentenced to a term of fifteen (15) years and subsequently appeal was perfected and the decision of the lower court was affirmed.

Appellants brought this instant action in pursuance to 28 U.S.C. § 2255; were summarily denied and it is from this denial that this appeal is taken.

QUESTIONS PRESENTED FOR REVIEW

(1) DID THE DISTRICT COURT ERR IN DENYING THE ALLEGATIONS IN THE MOTION TO VACATE SENTENCE WHEN THE MOTION AND ALLEGATIONS WERE UNCONTESTED BY THE UNITED STATES ATTORNEY'S OFFICE?

(2) DID THE DISTRICT COURT ERR IN IT'S FAILURE TO ABIDE BY THE MANDATES OF 28 U.S.C. §2255, THEREFORE DENYING THE APPELLANTS A PROPER HEARING UNDER 2255?

(3) DID THE COURT FAIL TO ADEQUATELY SEARCH THE RECORDS PRIOR TO MAKING A DETERMINATION OF THE MERITS OF THE ISSUES PRESENTED?

(4) WAS THE APPELLANTS DENIED DUE PROCESS OF LAW BY THE GOVERNMENT'S INTRODUCTION AT TRIAL OF UNLAWFULLY OBTAINED INFORMATION THROUGH AN UNCONSTITUTIONAL WIRETAP?

ARGUMENTS

(1) DID THE DISTRICT COURT ERR IN DENYING THE ALLEGATIONS
IN THE MOTION TO VACATE SENTENCE WHEN THE MOTION TO VACATE AND THE
ALLEGATIONS WERE UNCONTESTED BY THE UNITED STATES ATTORNEY'S OFFICE?

The District Court O R D E R E D a hearing to be conducted (See Exhibit I) on October 12, 1973, and summarily notified THOMAS PUCCIO, Assistant United States Attorney that a hearing on the Motion was being conducted. Apparently the hearing, O R D E R E D by the Court was never conducted. On January 5, 1974, the appellants wrote to the Clerk of the Court inquiring as to the status of the motion. After the hearing conducted on October 12, 1973, apparently, upon the receipt of the letter, the Court immediately issued it's memorandum and order, denying the motion.

Appellants contend that no hearing was ever conducted in October 12, 1973, and that the only reason for the Court's feeble attempt to satisfy the mandates of Section 2255, was by placing the Motion on the hearing calendar in October when a letter of inquiry was made by appellants on September 1, 1973.

The chronology of the procedures, were as follows:

- (1) Motion to Vacate Sentence, pursuant to 28 U.S.C. § 2255, filed by the appellants on, or about May 15, 1973.
- (2) Issuance of a Civil No. 73-C-882, directed to the Appellants by acknowledgement letter dated June 18, 1973.
- (3) Letter of inquiry to the Deputy Clerk on September 1, 1973.

(4) Notice of hearing on Motion to Vacate Sentence, dated October 3, 1973, for hearing on October 12, 1973 (Exhibit I Attached).

(5) Letter of inquiry dated January 5, 1974 from Appellants to the Clerk of the Court.

(6) MEMORANDUM AND ORDER of denial, dated January 8, 1974, signed by ORRIN G. JUDD, U.S.D.J.

(2) DID THE DISTRICT COURT FAIL TO ABIDE BY THE MANDATES OF 28 U.S.C. § 2255, THEREFORE DENYING THE APPELLANTS A PROPER HEARING UNDER 2255?

As recently held by this Circuit in the CASE of Taylor vs. United States, 487 F. 2d 307 (1973):

"Where federal prisoner raises issue which would require a new trial if factually sustained and he presents a sufficient affidavit in its support, an opposing affidavit by Government is not part of "files and records" of case which can be taken to conclusively show that prisoner is entitled to no relief, within statute providing that a motion for vacation of sentence may be filed at any time, unless files and records of the case conclusively show that prisoner is entitled to no relief. 28 U.S.C. § 2255."

Once the District Court set the motion for a hearing on October 12, 1973, the failure of the United States Attorney's office to file an answer, or to make an appearance, under the provisions of Section 2255, would have mandated that the facts alleged in the original petitioner's motion would be true, and the appellants should have been granted an evidentiary hearing. Failure to do so was contrary to the mandates of 2255.

(3) DID THE COURT ~~RE~~ FAIL TO ADEQUATELY SEARCH THE RECORDS
PRIOR TO MAKING A DETERMINATION OF THE MERITS OF THE ISSUES PRESENTED?

On Exhibit II attached, the Court stated that no appearance was made for the United States Attorney, and further stated: "On this motion to vacate sentence, the United States Attorney failed to assist the court in its analysis of the record.....Plaintiffs were tried in January 1971 for conspiracy to import heroin....." A more thorough examination of the records in the instant case would have revealed that the appellants were charged with conspiracy to import cocaine. The court had to experience an incompatible position in a ruling in the instant case---that of the prosecutor--and that as the judge. The courts having to act in two such capacities is prejudicial to the petitioner's rights under a 2255 motion, once the motion is accepted and docketed.

It was the opinion of the Court to permit a hearing on the issues presented, as the Court assigned a Civil No. (73-C-882) to the case, and with this assignment, served notice on the United States Attorney's Office to offer any rebuttal to the Motion as they deemed necessary. The failure of the United States Attorney's Office to offer any rebuttal should have mandated an evidentiary hearing. As recently held in the Sixth Circuit Thomas Larry Kelley vs. United States of America, (No. 73-1240, Decided November 29, 1973), in granting the reversal the Court stated:

"(W)e conclude that the district court erred in not awaiting an answer by the United States Attorney because if the allegations in the motion are true, appellant is entitled to relief because invalid convictions cannot be used to enhance a sentence....."

Consequently, it boils down to the fact that the Court, in not awaiting an answer from the United States Attorney's Office it failed in it's duties to act as advocate for the petitioner as well as the respondents, and prejudiced the appellants.

(4) WAS THE APPELLANTS DENIED DUE PROCESS OF LAW BY THE GOVERNMENT'S INTRODUCTION AT TRIAL OF UNLAWFULLY OBTAINED INFORMATION THROUGH AN UNCONSTITUTIONAL WIRETAP?

It has been held that an indictment cannot stand if founded upon illegal evidence People vs. Burleson, 119 Misc. 107, 195 N.Y.S. 234. "Grand jury can receive none but legal evidence."

The denial of equal protection is apparent in light of the fact that while Section 605 of the Federal Communications Act of 1934 is Federal Law applicable to all persons, the Federal Judiciary extends its protection only to those persons whose rights under 605 were violated by Federal agents. "Equal protection of the laws" -- That a law shall apply alike to all within a group or class, under the provisions of the 14th Amendment, no state may deny the equal protection of the laws to any person. Appellants were clearly under the protective intent of the Act, Benanti vs. United States, 355 U.S. 96, and respondent was clearly withing the express prohibitory language of Section 605, which provides in part: "...no person not being authorized by the sender shall intercept....." Benanti, supra.

It seems obvious, in the instant case, that the Order or Warrant to intercept appellants telephonic communications was obtained under "color of law" rendered unlawful and inoperative by Section 605 of the Federal Communications Act.

In McCullock vs. Maryland, 4 Wheaton (U.S.) 316, 4 L.Ed. 579

Mr. Chief Justice Marshall said, in part:

"/.....the act.....of the United States is a law made in pursuance of the Constitution, and is a part of the Supreme law of the land..... "

Consequently appellants say that they were denied "Due Process" of law by the illegal interception of their telephonic messages, and the subsequent improper denial of an evidentiary hearing on their Motion to vacate sentence, and PRAY that this Court will O R D E R the District Court to hold an Evidentiary Hearing on this matter.

Respectfully submitted,

Gino Fantuzzi
Gino Fantuzzi, Appellant Pro Se

STATE OF GEORGIA)
: SS
COUNTY OF FULTON)

Sergio Jacamillo
Sergio Jacamillo, Appellant Pro Se

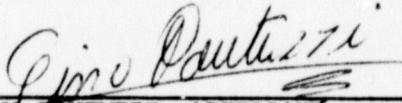
SWORN TO AND SUBSCRIBED BEFORE ME

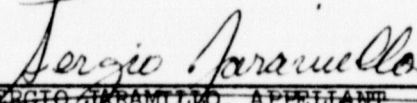
THIS 19 DAY OF MARCH, 1974.

Harold Williams
NOTARY PUBLIC (PAROLE OFFICER)
Parole Officer Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

CERTIFICATE OF SERVICE BY MAIL

GINO FANTUZZI AND SERGIO JARAMILLO, Appellants herein, certify that they have this date mailed a copy of the attached BRIEF OF APPELLANT to the UNITED STATES ATTORNEY, FOR THE EASTERN DISTRICT OF NEW YORK, BROOKLYN, NEW YORK, by certified mail on this the ____ day of March, 1974.


GINO FANTUZZI, APPELLANT


SERGIO JARAMILLO, APPELLANT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____X	
GINO FANTUZZI et al	:
	:
-against-	:
	:
USA	:
_____X	

Docket No. 73 C 882

Notice of hearing on
motion to vacate sentence

TAKE NOTICE that the above case has been set for hearing
at U.S. Courthouse, 225 Cadman Plaza East, Brooklyn, N.Y. at 10 AM
on October 12 , 1973 before JUDGE ORRIN G. JUDD in Courtroom #11
on the 6th Floor. XX
XXXXXXXX

Dated: October 3, 1973

LEWIS ORGEL

Clerk

JAMES GIOKAS

Deputy Clerk

To: Calendar Clerk
Court File
Miss Wasserman

Thomas Puccio, AUSA

Gino Fantuzzi, pro se
United States Penintentiary
P.M.B. - 7046 3158
Atlanta, Georgia 30315

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

<hr/>		
GINO FANTUZZI and SERGIO JARAMILLI,	:	
	:	73-C-882
Petitioners,	:	
	:	
-aga inst-	:	
UNITED STATES OF AMERICA,	:	January 8, 1974
	:	
Respondents.	:	
<hr/>		

Submitted by:

GINO FANTUZZI
SERGIO JARAMILLO
Petitioners, Pro Se

No appearance for United States Attorney

J U D D, J.

MEMORANDUM AND ORDER

On this motion to vacate sentence, the United States Attorney has failed to assist the court in its analysis of the record.

Petitioners claim that their conviction was unlawful, asserting that the warrant authorizing the interception of telephone conversations did not describe the property sought and the conversations to be intercepted.

Exhibit II

They also assert that the translation of conversations from Spanish to English could destroy their meaning.

Plaintiffs were tried in January 1971 for conspiracy to import heroin. They were represented by an experienced attorney and found guilty by the court sitting without a jury, after a six-day trial. Their convictions were affirmed after appeal, on which they were also represented by counsel. 463 F. 2d 683 (2d Cir. 1972).

In pretrial discovery proceedings, it had been established that the telephone conversations were intercepted pursuant to an order of the United States District Court for the Southern District of New York (Wyatt, J.). Copies of the order and supporting papers, as well as transcripts of the intercepted conversations, were made available to petitioner's attorney. The tapes were made available for petitioners and their attorney to hear before trial. Their attorney brought a Spanish interpreter to court.

Objections to the validity of the wire tap order were made before trial and overruled by the court. The Court of Appeals held that there was probable cause for the wiretap order and that there was sufficient evidence to

sustain the convictions.

Much of the evidence derived from wiretaps was confirmed by Spanish speaking witnesses who testified at the trial. The man who made the English translation of the Spanish telephone conversations was produced by the government and was subject to cross-examination by defense counsel.

There is no merit to the application.

It is ORDERED that the petition be denied.

/s/ ORRIN G. JUDD
U. S. D. J.

D. 100
730 882
DOCKET

Sec. 2255

CLOSED

JUDD,

TITLE OF CASE

GINO FANTUZZI & SERGIO LUIS JARAMILLO

-VS-

UNITED STATES OF AMERICA

ATTORNEYS

For Plaintiff:

Gino Fantuzzi/Pro Se
Box P.M.B.

Atlanta, Ga.

For Defendant:

BASIS OF ACTION: Pursuant to Sec. 2255

(Related Case: 70 CR 408)

JURY TRIAL CLAIMED

ON

[illegible]

ABSTRACT OF COSTS

[illegible]

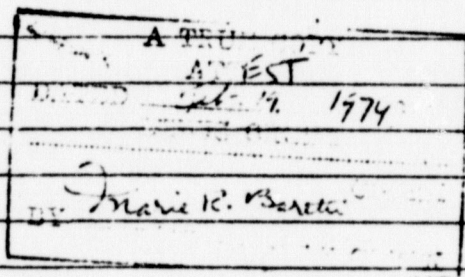
RECEIPTS, REMARKS, ETC.

73C 882

GINO FANTUZZI & ANO. v. U.S.A.

"13"

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS	
6-18-73	Motion filed to vacate sentence & set aside judgment (70CR408)	1	JS5
6-18-73	Copy of letter of Clerk of Court filed dated 6-18-73 acknowledging motion papers, etc.	2	
7-13-73	Before JUDD, J. Case called. No appearances. Marked Submitted DECISION RESERVED.		
9-7-73	Letter of relator to Clerk filed dated 9-1-73 re: hearing.	3	
10-12-73	Before JUDD, J. Case called. Marked Submitted. DECISION RESERVED.		
-8-74	BY JUDD, J. MEMORANDUM and ORDER FILED. ORDERED that the petition be DENIED. (See Memo., etc.) Copy sent to Mr. Gino Fantuzzi, to Assistant U.D. Atty., and to Bureau of National Affairs, etc., by the secretary to JUDD, J.	4	
1-11-74	Letter of petitioner herein filed, together with a reply from Clerk of Court dated Jan. 11, 1974 re memo., etc.	5 & 6	
1-25-74	PETITION FILED FOR A RE-HEARING and/or NOTICE OF AN APPEAL	7	
-28-74	BY JUDD, J., MEMORANDUM filed. Petitioner's application to reconsider, etc., is DENIED. but the petition will be recognized as a Notice of appeal. Since the petition in this court was treated as being made in forma pauperis, petitioner may proceed on appeal in forma pauperis under F.R.A.P. 24(a) (See Memo.) Copy of memo., etc., was on this day mailed to Gino Fantuzzi, by secretary to JUDD J.	8	



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
GINO FANTUZZI and SERGIO JARAMILLO, :

73-C-802

petitioners, :

FILED
M' FILMED

- against - :

UNITED STATES OF AMERICA, :

Respondents. :

January 8, 1974

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

-----x
Submitted by:

JAN 8-1974 ★

GINO FANTUZZI
SERGIO JARAMILLO
petitioners, Pro Se

TIME A.M.
P.M.

No appearance for United States Attorney

J U D D, J.

MEMORANDUM AND ORDER

On this motion to vacate sentence, the United States Attorney has failed to assist the court in its analysis of the record.

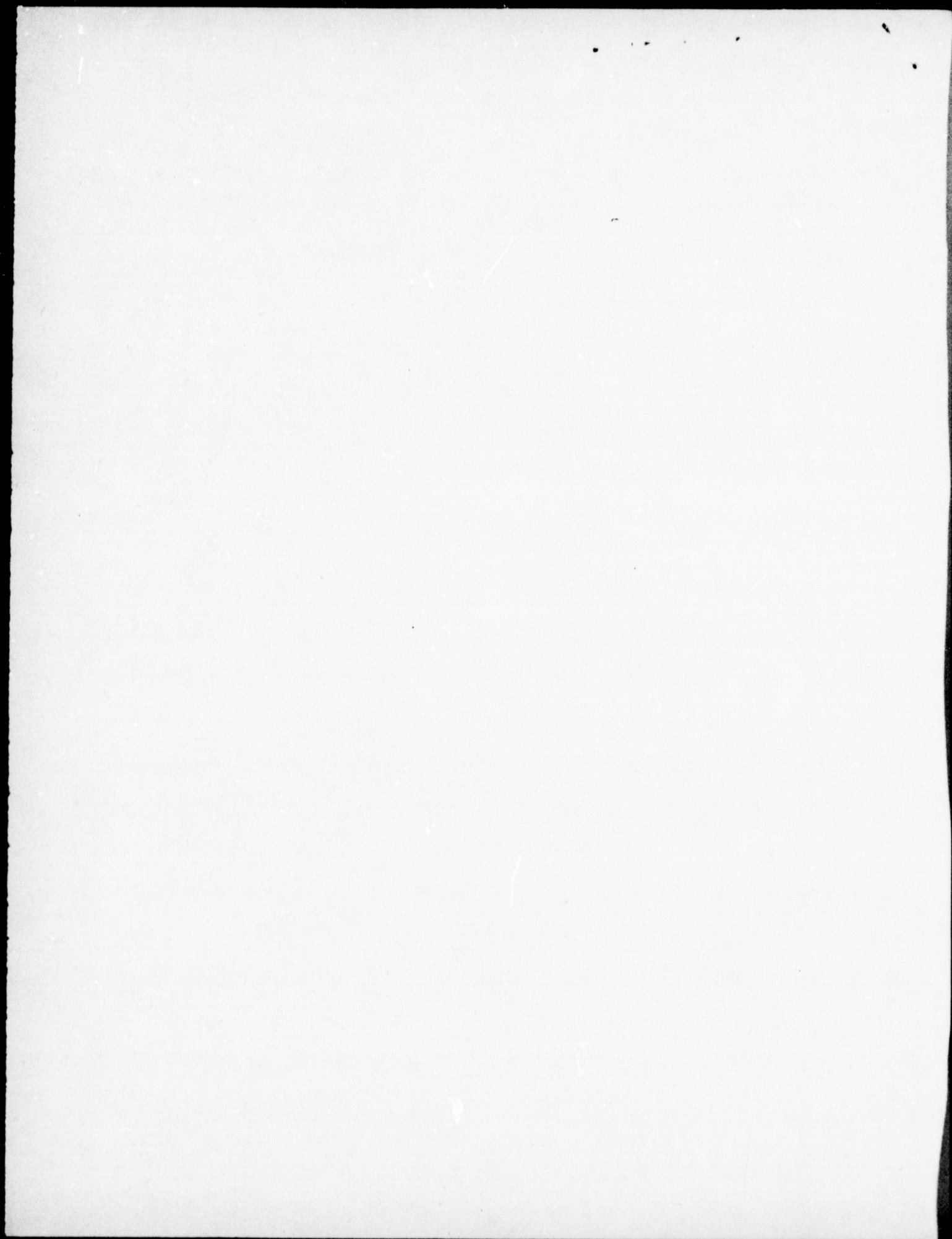
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Much of the evidence derived from wiretaps was confirmed by Spanish speaking witnesses who testified at the trial. The man who made the English translation of the Spanish telephone conversations was produced by the government and was subject to cross-examination by defense counsel.

There is no merit to the application.

It is ORDERED that the petition be denied.


U. S. D. J.